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Nos. 85-615 and 85-639

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA DEPARTMENT OF TRANSPORTATION,
PETITIONERS

v.

NAEGELE OUTDOOR ADVERTISING COMPANY
OF CALIFORNIA, INC.

DESERT OUTDOOR ADVERTISING, INC., PETITIONER

v.

NAEGELE OUTDOOR ADVERTISING COMPANY
OF CALIFORNIA, INC.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Highway Beautification Act of 1965 authorizes the states and third parties to seek enforcement of state laws regulating outdoor advertising, where the alleged violations occur on tribal trust lands located within a federal Indian reservation and are pursuant to a duly-approved agreement between the Indian tribe and a non-Indian lessee.

2. Whether, if the Highway Beautification Act does not make state laws regulating outdoor advertising enforceable on reservation trust lands, such state laws may nevertheless be enforced on such lands.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Title I of the Highway Beautification Act of 1965 (HBA), Pub. L. No. 89-285, 79 Stat. 1028, 23

U.S.C. 131, implements Congress's finding that "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate Systems and the [federal-aid] primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. 131(a).[1]

Subsection (b) of Section 131 provides that if the Secretary of Transportation determines that a state has not provided for the "effective control" of outdoor advertising along Interstate highways, federal-aid highway funds apportioned to that state shall be reduced by 10% until the state does provide for such control.[2] Subsection (c) defines the term "effective control" to limit permissible billboards to five specific categories: (*i.e.*, directional and official signs, landmark signs and notices, signs advertising sale or lease of the property upon which they are located or advertising activities conducted on that property, and free coffee signs).[3] The Secretary is, however,

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[1] The four federal-aid highway systems, defined in 23 U.S.C. 103(a), include the primary and secondary systems, the urban system, and the Interstate System. The primary system consists of "an adequate system of connected main highways" selected by the state and approved by the Secretary of Transportation. Although Section 131 applies to both the primary system and the Interstate System, for simplicity herein we will refer simply to the Interstate System, which is the only one involved in this case.

[2] Subsection (*l*) provides, in substance, that a state may seek judicial review of the Secretary's final determination to withhold funds.

[3] The federal government will pay 75% of the just compensation for the removal of any outdoor sign lawfully

directed to provide, in consultation with the states, for areas in which other signs "giving specific information in the interest of the traveling public may be erected and maintained" (23 U.S.C. 131(f)). Such signs must conform to national standards to be promulgated by the Secretary (see 23 C.F.R. Pt. 750).[4] Finally, Subsection (h)—the provision at issue in this case—states:

> All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

2. As summarized by the court below, the evidence shows that the Morongo Band of Mission Indians, a federally-recognized Indian tribe, occupies the Morongo Indian Reservation, which consists of approximately 39,300 acres in Riverside County, California. The Reservation was created by a series of seven executive orders, a presidential proclamation, and a trust patent issued pursuant to the Mission Indian Relief Act of 1891, ch. 65, 26 Stat. 712. The Morongo Reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges. Only a small portion of the Reservation is located on relatively flat land suitable for commercial develop-

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erected under state law but not permitted under 23 U.S.C. 131(c). See 23 U.S.C. 131(g). Subsection (k) provides that "[s]ubject to compliance with" the just compensation provision, a state may establish standards imposing stricter limitations than those required by the HBA.

[4] The HBA also specifies certain other exceptions to the general sign prohibition of Subsection (c). See Subsections (d), (e), (i), (n) and (o).

ment. These few acres are adjacent to Interstate Highway 10, connecting the Los Angeles area with the eastern part of the state. The Reservation's few natural resources yield little income, and many of the Morongo are unemployed and live in poverty. Pet. App. 14a-15a.[5]

For many years, the Band has derived a major part of its income from outdoor advertising. The Morongo[6] have determined that the highest and best use of the land adjacent to Interstate 10 is for outdoor advertising. This conclusion was confirmed by an appraisal report prepared by the Bureau of Indian Affairs of the Department of the Interior (BIA) in 1977. Pet. App. 14a-15a. The Morongo leased some Reservation land to non-Indian firms for billboards before 1977; in that year, proposals for further leases were solicited from several non-Indian firms, including respondent. Respondent's proposal was selected, and the proposed lease was submitted to the BIA for approval pursuant to 25 U.S.C. 415.[7] Pet. App. 15a-16a.

The Sacramento Area Director of the BIA initially denied approval on the grounds that the outdoor advertising contemplated by the proposed lease would violate the HBA and California's Outdoor Advertising Act, Bus. & Prof. Code § 5200 *et seq.* (West 1974). The Morongo appealed the Area Director's decision, and the Interior Board of Indian Appeals

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[5] "Pet. App." references are to the appendix in No. 85-615.

[6] References to the Morongo refer either to the general membership of the band or to their Tribal Council, authorized by the membership to negotiate advertising agreements (Pet. App. 15a).

[7] Section 415 requires the approval of the Secretary of the Interior for leases of restricted Indian lands.

reversed. *Morongo Band of Mission Indians* v. *Area Director*, 7 I.B.I.A. 299, 86 Interior Dec. 680 (1979) (85-639 Br. in Opp. App. 1). The Board concluded that the HBA and the California statute had no application on reservation trust lands. Accordingly, the Board remanded the matter to the BIA with instructions to seek to effectuate the proposed lease. Pet. App. 16a.

On March 30, 1978, during the pendency of the administrative appeal, the Morongo and respondent executed an "agency agreement" by which respondent agreed to erect 15 billboards on the Reservation and to pay the Morongo $60,000 for the right to be their agent and $250,000 ($25,000 per year for 10 years) for the privilege of operating the billboards (85-615 Br. in Opp. 3). Respondent then erected 16 billboards on the Reservation.[8] The agreement was ultimately submitted to the BIA, and approved under 25 U.S.C. 415 on February 2, 1984, retroactive to 1978 (Pet. App. 16a n.1). The agreement was deemed by the BIA to be a lease replacing the earlier proposed lease which was the subject of the administrative appeal. *United States ex rel. Buxbom* v. *Naegele Outdoor Advertising Co.*, 739 F.2d 473 (9th Cir. 1984), cert. denied, No. 84-709 (Jan. 7, 1985).

3. On July 10, 1978, the State of California commenced an action in the Superior Court of Riverside County seeking preliminary and permanent injunctions against respondent. The State's complaint alleged that respondent was in control of 16 outdoor advertising structures located adjacent to Interstate

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[8] Counsel for the respondent has advised us that, in addition to the 15 billboards contemplated by the 1978 agreement, one additional billboard was erected on Reservation land under a separate agreement between respondent and the Morongo.

Highway 10 in Riverside County, which were displayed without the permits required by Section 5350 of the California Business and Professions Code (West 1974). The complaint further alleged that the displays were situated in violation of various provisions of the State's Outdoor Advertising Act (*id.* §§ 5200 *et seq.*), and that they constituted a public nuisance within the meaning of Section 5461 of the Business and Professions Code (West 1974). Pet. App. 17a. The superior court, on November 6, 1981, entered summary judgment in favor of the State. *Ibid.*

Petitioner Desert Outdoor Advertising, Inc., also filed an action in the superior court against respondent, which was subsequently consolidated with the State's action. Petitioner Desert alleged causes of action for nuisance, unfair competition, intentional interference with prospective economic benefit and negligent interference with such benefit. Respondent's demurrer was sustained as to the nuisance action and both causes of action for interference were dismissed, but the district court granted Desert's motion for summary judgment on the unfair competition cause of action.[9] In its order, the court enjoined respondent from maintaining advertising structures on the Reservation without complying with the Outdoor Advertising Act, and ordered respondent to remove all noncomplying structures. Pet. App. 17a-18a. Enforcement of the judgment was stayed pending appeal. Pet. App. 18a.

The state appellate court affirmed (Pet. App. 47a-66a). It concluded that federal law did not preempt the State from enforcing its Outdoor Advertising Act

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[9] Cal. Bus. & Prof. Code § 17200 (West Supp. 1986) defines "unfair competition" to include an unlawful business practice (Pet. App. 31a).

on federal Indian Reservations. In reaching this conclusion, the court found that "the Highway Beautification Act specifically contemplated and authorized states to regulate outdoor advertising on Indian lands adjacent to Interstate Highways." Pet. App. 63a. The court also rejected respondent's contention that the action must be dismissed for failure to join an indispensable party, the Morongo Band. Pet. App. 64a-66a.

The California Supreme Court reversed (Pet. App. 13a-34a). Relying upon this Court's decisions in *Hancock* v. *Train*, 426 U.S. 167 (1976) and *EPA* v. *State Water Resources Control Board*, 426 U.S. 200 (1976), the court held that a "clear and unambiguous [congressional] mandate" was required to permit the State to enforce its outdoor advertising restrictions on structures located on federal lands. Examining the text of the HBA—including Subsection (h)—and the legislative history of the Act, the court found no authorization for the enforcement of state laws on such lands. Accordingly, it concluded that "even if Congress intended the outdoor advertising standards of the Highway Beautification Act to apply on Indian Reservations, it did not intend that these standards be enforced through the assertion of state power." Pet. App. 27a.[10] Instead, the court found that the HBA "reserved to federal authorities the responsi-

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[10] The court also ruled that the Act of Aug. 15, 1953, ch. 505, 67 Stat. 589, 28 U.S.C. 1360 (Pub. Law 280), which provides (inter alia) for California state court jurisdiction over private civil litigation involving Reservation Indians (see *Bryan* v. *Itasca County*, 426 U.S. 373 (1976)), does not authorize the State to enforce its Outdoor Advertising Act on Indian Reservation land. Pet. App. 27a-28a. Neither petition seeks review of any issues regarding Public Law 280.

bility for enforcing the act's provisions upon federal lands and reservations," and thus preempted state regulation. *Id.* at 30a-31a. As further support for its preemption ruling, the court noted that Congress has granted the Secretary of the Interior authority to supervise the leasing of Indian lands, and that the Secretary has issued extensive regulations pursuant to that authority. *Id.* at 30a n.9.[11]

DISCUSSION

The decision below does not conflict with that of any federal court or other state supreme court, and does not present any issue warranting review by this Court. Accordingly, certiorari should be denied.

1. The initial question presented in the petition filed by Desert Outdoor Advertising, Inc.—whether the provisions of the HBA extend to Indian Reservations—was not considered or decided in these consolidated actions by any of the courts below and, hence, is not properly before this Court. Contrary to petitioner Desert's implications, none of the California courts in these proceedings determined whether the requirements of the HBA, itself, are applicable to federal Indian Reservations. Rather, the federal statutory issue that those courts considered was whether the HBA (most particularly, Subsection (h)) makes *state* laws regulating outdoor advertising applicable to, and enforceable on, federal Indian Reservations—a distinctly different question. Thus, the California Court of Appeal characterized the issue before it as follows (Pet. App. 54a):

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[11] In light of its resolution of the other issues, the court found it unnecessary to consider respondent's indispensable party argument. The court subsequently modified its opinion in certain respects not material here (Pet. App. 40a-41a).

> The lower court in both cases concluded the [California] Outdoor Advertising Act was applicable in its summary judgment rulings. This appeal therefore raises the issue of whether the [California] Outdoor Advertising Act applies to a non-Indian company acting pursuant to an agency agreement providing for the construction and maintenance of advertising display devices on reservation land held in trust by the United States for the beneficial use of the Morongo Band Mission Indians.

The court cast the issue entirely in terms of whether state law requirements applied; no consideration whatsoever was given to whether any restrictions were imposed by the HBA itself. Moreover, the Supreme Court of California expressly refused to decide whether the requirements of the HBA are applicable on the lands at issue. Pet. App. 21a-22a.[12]

2. Petitioner Desert also argues (Pet. 9-17) that the HBA impliedly authorizes enforcement of state statutes on federal Indian Reservations, and that respondent's posting of billboards on the Morongo Reservation is accordingly unlawful competition under California law. The Supreme Court of California correctly rejected this argument.

Where, as here, a party is carrying out an activity on federal lands pursuant to specific federal authori-

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[12] There is, accordingly, no occasion in this case to consider whether the federal statute, standing alone, creates an implied private right of action enforceable by the State or Desert in the context of this case. The courts that have considered the issue have held, correctly in our view, that the HBA does not create an implied right of action. See *National Advertising Co.* v. *City of Ashland*, 678 F.2d 106, 109 (9th Cir. 1982); *Parks* v. *Donrey, Inc.*, 596 F. Supp. 347 (W.D. Ark. 1984).

zation, state regulation prohibiting or substantially burdening such activities will be allowed only where the federal government has clearly consented to such state regulation. As this Court stated in *Hancock* v. *Train*, 426 U.S. 167, 179 (1976) (citations and footnotes omitted):

> [W]here "Congress does not affirmatively declare its instrumentalities or property subject to regulation," "the federal function must be left free" of regulation. Particular deference should be accorded that "old and well-known rule" where, as here, the rights and privileges of the Federal Government at stake not only find their origin in the Constitution, but are to be divested in favor of and subjected to regulation by a subordinate sovereign. Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous."

Petitioner Desert discerns the required "clear and unambiguous" congressional consent to state regulation in Subsection (h) of the HBA, which states that "[a]ll public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary." As the court below correctly observed, however, Subsection (h) provides only that advertising "shall be controlled", without specifying whether such control shall be exercised by federal land man-

agers or the states. In light of this inescapable ambiguity, the Supreme Court of California correctly resolved the issue in favor of exclusive federal control. Pet. App. 21a-27a.

Moreover, the legislative history of the HBA—far from dispelling this ambiguity in petitioner's favor—provides further support for the State Supreme Court's conclusion. The statutory predecessor to the HBA (Section 122 of the Federal-Aid Highway Act of 1956, ch. 462, 70 Stat. 387, as added by Section 12 of the Federal-Aid Highway Act of 1958, Pub. L. No. 85-381, 72 Stat. 95, codified by the Act of Aug. 27, 1958, Pub. L. No. 85-767, 72 Stat. 885 *et seq.* (23 U.S.C. (1959 ed.) 131)) like the present HBA, contemplated that the states, rather than the federal government directly, would generally undertake the actual task of regulating outdoor advertising along the Interstate highway system. As an exception to this general policy, however, the 1958 Act clearly indicated that Congress did not intend state regulation to extend to federal lands and Reservations. Section 12, 72 Stat. 96 (§ 122(d)) of that Act provided:

> Whenever any portion of the Interstate System is located upon or adjacent to any public lands or reservations of the United States, the Secretary of Commerce may make such arrangements and enter into such agreements with the agency having jurisdiction over such lands or reservations as may be necessary to carry out the national policy set forth in subsection (a) of this section, and any such agency is hereby authorized and directed to cooperate fully with the Secretary of Commerce in this connection.

In 1965, Congress replaced the former Section 122 with the present HBA. Like its statutory predecessor,

the HBA generally provided that the states, rather than the federal government, would directly regulate outdoor advertising. As to federal lands and Reservations, however, the new statute stated only that outdoor advertising on such properties "shall be controlled" in accordance with the provisions of the HBA and the national regulations promulgated pursuant to that statute. There is no suggestion in the legislative history of the new HBA that Congress intended to alter the established practice by which federal land managers, rather than the states, are responsible for controlling outdoor advertising on the public lands. Instead, Congress evidently intended to alter prior practice only to the extent that the substantive standards embodied in the HBA (and the national regulations promulgated thereunder by the Secretary) would henceforth be generally applicable on the federal lands without any need for prior interagency agreements. Thus, the House Report states that "[t]his section simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or the primary system the same controls covering other roads which are subject to this legislation." H.R. Rep. 1084, 89th Cong., 1st Sess. 8 (1965). If, in enacting the HBA, Congress had intended to make a significant change in the existing system by giving the states, rather than the responsible federal agency, the authority to control outdoor advertising on the federal lands, it would surely have referred to such an unusual transfer of authority, instead of merely noting, as it did, that the new provision "simply" extends the controls of the HBA to federal lands.[13]

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[13] Moreover, as the court below noted (Pet. App. 26a-27a), the enforcement scheme of the Act, which relies on the state

3. Petitioner State of California, in contrast to Desert, does not contend that the HBA authorizes it to apply its laws regulating outdoor advertising on Indian Reservation trust lands. Rather, the State apparently asserts an "inherent power" (85-615 Pet. i) to apply such laws within federal Indian Reservations that is not preempted by the HBA. Again, the court below properly rejected this contention.

This Court has clearly indicated that state laws may not be applied to activities of non-Indians on an Indian Reservation where " 'such application would interfere with Reservation self-government or would impair a right granted or reserved by federal law.' " *Rice* v. *Rehner*, 463 U.S. 713, 718 (1983), quoting *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). Thus, while one goal of the judicial inquiry is to determine the congressional plan, the concept of tribal sovereignty is also to be given substantial weight; this Court will not necessarily apply "those standards of pre-emption that have emerged in other areas of the law." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980). Instead, the Court has "employed a pre-emption analysis that is informed by historical notions of tribal sovereignty," although not "determined by them." *Rice* v. *Rehner*, 463 U.S. at 718.[14]

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powers of zoning and eminent domain, is inconsistent with an intent that state laws be enforced on Indian reservation trust lands, where the states do not have such powers.

[14] Where the state attempts to exercise authority over non-Indians conducting business on the Reservation, the Reservation boundary "remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. at 151.

There is no definitive formula for determining whether a state may exercise authority over on-Reservation activities of non-Indians. *Ramah Navajo School Bd.* v. *Bureau of Revenue*, 458 U.S. 832, 837 (1982). Rather, the issue must be determined by a particularized examination and analysis of the various state, federal and tribal interests at stake. 458 U.S. at 838. In particular, the pervasiveness of federal regulation of the activity in question will be considered in determining whether state regulation has been preempted; the presence of an extensive federal regulatory scheme ordinarily indicates that " 'no room remains for state laws imposing additional burdens * * *.' " *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U.S. 160, 163-164 (1980), quoting *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 690 (1965).

The balance here weighs heavily against state regulation. In essence, the State maintains that it may regulate the purposes for which the Morongo, with the approval of the Department of the Interior, may lease tribal lands. The federal laws and regulations governing the leasing of Indian lands, however, are so comprehensive that "no room remains for state laws imposing additional burdens." The leasing of Indian lands has traditionally been the province of the federal government—indeed, the existence of federal restrictions upon the leasing of Indian lands has been a fundamental aspect of federal Indian law for almost 200 years. See Section 4 of the Act of July 22, 1790, ch. 33, 1 Stat. 138; Section 12 of Act of May 19, 1796, ch. 30, 1 Stat. 472. Federal law today provides for comprehensive approval authority over such leasing by the Secretary of the Interior. Thus, 25 U.S.C. 415(a) generally requires Secretarial approval for a

lease of restricted Indian lands and provides that "all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior." See also 25 U.S.C. 380, 393, 393a, 394, 395, 397, 402, 402a, 403, 403a, 403b, 403c. 415a, 415b, 415c, 415d, 477 and 635. Pursuant to these statutory authorizations, the Secretary of the Interior has promulgated extensive regulations governing the leasing of Indian lands. See 25 C.F.R. Pt. 162.

In short, the federal regulatory scheme concerning the leasing of restricted Indian lands is at least as comprehensive as the various federal regulatory programs concerning Indian education, trading with the Indian tribes, or logging on Indian lands, all of which this Court has determined to be so extensive as to preempt state regulation. See *Ramah Navajo School Bd.* v. *Bureau of Revenue, supra; Central Machinery Co.* v. *Arizona Tax Comm'n, supra; White Mountain Apache Tribe* v. *Bracker, supra.* Accordingly, the Supreme Court of California rightly concluded that California laws regulating outdoor advertising may not be enforced against respondent, a duly approved lessee of restricted Indian lands.[15]

4. In any event, this case does not present a question of sufficient importance to warrant review by this Court at this time. The State has made no showing, beyond unsubstantiated suggestions, that the presence of billboards on Indian reservations is a recurring and serious problem threatening the State's

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[15] Indeed, the State's contention that erection of these billboards is prohibited by state law would effectively nullify the Secretary's approval of the lease for the specific purpose of erecting them. In this context, the application of state law would not merely burden the federally approved activity, it would completely override the federal approval.

essential regulatory interests or otherwise presenting genuinely significant state concerns.[16] Indeed, the petitions fail to mention a single case beyond the Morongo Reservation where a similar problem has arisen, and we are aware of none. Nor does the decision below threaten the achievement of the policies furthered by the HBA. All leases of restricted Indian lands are subject to the approval of the Secretary of the Interior. Regardless of whether the HBA is technically applicable to Indian Reservation lands, the Secretary may take the federal policies expressed in the HBA into account when a proposed lease is submitted to him for approval, and may reject it on the ground that it is contrary to federal policy. See *Moapa Band of Paiute Indians* v. *United States Dep't of Interior*, 747 F.2d 563 (9th Cir. 1984) (upholding Interior's rejection of proposed tribal ordinance permitting brothels, on ground of general federal policy disfavoring prostitution).[17] Hence, the Secretary of the Interior can protect the interests of the general

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[16] There is absolutely no basis for petitioner Desert's suggestion (Pet. 11-13) that the Secretary of Transportation would attempt to reduce a state's share of federal highway funding for not controlling outdoor advertising on federal lands and reservations. In any event, Subsection (*l*) of the HBA provides for judicial review—necessarily including the possibility of review by this Court—of any such proposed reduction.

[17] Section 415(a) specifically requires that, before approving a lease, "the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality and safety of any structures or other facilities to be constructed on such lands; * * * and the effect on the environment of the uses to which the leased lands will be subject."

public and implement federal statutory policy in this area.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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